IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEBORAH HEWITT; JAN MITTELSTAEDT, Plaintiffs/Appellants v. BOARD OF DIRECTORS OF THE ARIZONA COMMERCE AUTHORITY, an agency of the State of Arizona, et al. Defendants/Appellees.	Arizona Court of Appeals Case No. 2 CA-CV 2025-0451 -and- Case No. 2 CA-CV 2026-0013 Maricopa County Superior Court Case No. CV2025-001929

RESPONSE TO STATE OF ARIZONA'S AMICUS BRIEF

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INTRODUCTION

The basic problem with the State's amicus brief (State Br.) is that it confuses two different issues: on one hand, the prospective reduction of taxation—that is, the state's choice not to tax something, or to reduce people's taxes going forward—and, on the other hand, the nullification or exemption of known tax liabilities, which is a form of aid or subsidy in violation of the Constitution. As Taxpayers have already explained in their merits briefs, this distinction is crucial.

Obviously, the state can cut taxes across the board, or reduce tax rates; and of course it can "incentivize certain behavior," State's Br. at ep.15, so long as it does not do so through subsidies. But for the state to eliminate tax liability as a form of aid or subsidy to a particular industry or group of beneficiaries is certainly a gift. It is the extension of a financial benefit "in aid of the promoters of [an] enterprise, work, or improvement … which is considered a proper subject for state aid, because likely to be of benefit to the public," which is literally the dictionary definition of "subsidy." *Black's Law Dictionary* 1117 (2d ed. 1910).[1] Tax-exemption subsidies were common in the nineteenth century, and were one of the primary evils the Gift Clause was written to prevent. *See* Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 Regent U. L. Rev. 1, 33-56 (2024).

[1] https://archive.org/details/blacks-law-dictionary-2nd-edition-1910_Petition-of-Right/page/1116/mode/2up.

In addition to fallaciously obscuring this critical distinction, the State also twists the language of cases such as *Schires v. Carlat*, 250 Ariz. 371 (2021), and *Kotterman v. Killian*, 193 Ariz. 273 (1999), to say things those cases simply do not say. And it argues that a statute can never be a facial violation of the Gift Clause: an illogical and unprecedented theory.

Of course, the state has the "power *not* to tax." State's Br. at ep.12. That's not at issue here. What is at issue is a Program whereby film companies have their *actual tax liabilities eliminated*, and even have *checks sent to them from the treasury*, in exchange for no measurable value to the general public. That's an unconstitutional gift. And because the Program imposes neither government oversight nor any actual duty on the part of the recipients, it is unconstitutional both facially and as applied.

ARGUMENT

I. The State ignores the distinction between tax cuts and tax-elimination subsidies.

The State rests most of its argument obscuring the distinction between (a) the government cutting people's taxes prospectively, and (b) designing a tax-credit scheme that not only eliminates the tax liabilities of the fortunate recipients, but even sends them checks out of the state's treasury, in order to foster their business. That distinction is, of course, critical—because it's true that the State has the power to not tax, or to reduce taxes, but it has no power to provide aid or gifts

to private entities "by subsidy *or otherwise*." Ariz. Const. art. IX § 7 (emphasis added).

Even the government's power not to tax, or to cut taxes, is limited by the Constitution.[2] For example, they must be consistent with the Uniformity Clause, *id.* art. IX § 1, the Non-Exemption Clause, *id.* § 2(13), the Equal Privileges and Immunities Clause, art. II § 13, etc. *See* State Br. at ep.7, 20. Therefore the state's "power *not* to tax" is still confined by constitutional limits—and that includes the prohibition on giving aid, donations, or grants "by subsidy or otherwise" to a private business. Ariz. Const. art. IX § 7.

A. The Gift Clause was written to forbid tax-elimination subsidies.

That phrase—"by subsidy or otherwise"—is essential. Arizona's is the only Constitution that includes this language, and history shows that it was adopted *specifically* to prevent the state from finding ways to subsidize businesses that fall outside the categories of "aid" "gift" "loan of credit," and other prohibitions enumerated in the clause. In fact, what the framers had in mind was the problem of

[2] The State asserts it has "plenary" taxation authority, State's Br. at ep.8, but that plenary power is "[s]ubject to constitutional limitations." *Waddell v. 38th St. P'ship*, 173 Ariz. 137, 140 (Tax Ct. 1992). The State purports to respect those limits, *see* State Br. at ep.7, 20, but then asserts that they don't include the Gift Clause. Thus the State—like its own agencies, Appellees—tries to have its cake and eat it too.

the state using tax-elimination schemes to subsidize private industry, in just the way that the Program here does. *See* Sandefur, *supra*, at 33-56.

Specifically, in the late nineteenth century, several states experimented with subsidizing railroad construction and similar infrastructure projects. This resulted in an "'org[y] of extravagant dissipation of public funds.'" *State v. Nw. Mut. Ins. Co.*, 86 Ariz. 50, 53 (1959) (quoting *Thaanum v. Bynum Irr. Dist.*, 232 P. 528, 530 (1925)). At first, these subsidies took the form of outright loans or payoffs. But voters became frustrated by the waste, fraud, abuse, and favoritism involved in such schemes, so they amended their constitutions to prohibit such direct subsidies, payments, and loans. Consequently, some state legislators sought new ways to subsidize businesses while evading these restrictions—and the principal means was to subsidize railroads (etc.) with tax-exemptions. Unfortunately, this resulted in still more favoritism and waste. Consequently, many states reformed their constitutions again, this time prohibiting tax-exemption subsidies as well. One of these states was Arizona.

The most infamous railroad subsidy of the era occurred in Illinois, which spent millions to aid railroad development in the 1830s—and as a result, the state nearly went bankrupt. *See* Sandefur, *supra* at 9. So, in 1848, Illinoisans wrote a new constitution forbidding outright payments of cash or loans of credit to private

entities. *Id.* But state legislators still wanted to subsidize railroad construction,[3] so they resorted to exempting the Illinois Central Railroad from all taxation. *See* id. at 33-34.

By the end of the 1860s, this had come to be widely viewed as unjust by a new generation of reformers who asserted that wealthy, powerful corporations should not be free to operate without paying their share of the tax burden, just because politicians wanted to encourage their operations. The Grange Movement in particular complained that exempting railroads from taxation forced farmers to bear a disproportionate share of the tax burden. Solon Buck, *The Granger Movement* 105 (1913).[4] As one reformer observed in 1873, "the great animosity of the people toward the railroad" was understandable, given that "the railroad refuses to pay its share of taxes." *The Railroad Question in California,* The Railroad Gazette, Sept. 20, 1873, at 380.

This is relevant to Arizona because of the way these controversies over tax-elimination subsidies influenced the writing of the Montana Constitution—from which our Gift Clause was copied.[5] Pre-statehood Montana was sharply divided

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[3] This was not because they were corrupt; they "were sincerely motivated by goals such as promoting economic development and enhancing the tax base." *Turken v. Gordon*, 220 Ariz. 456, 471 ¶ 46 (App. 2008). But their sincerity did not change the fact that such subsidies were economically wasteful and politically unfair.
[4] https://archive.org/details/grangermovement0000solo/page/n127/mode/2up.
[5] "[O]ur Gift Clause was taken nearly verbatim from Montana's constitution." *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 10 (2010).

over the propriety of subsidizing railroads through the elimination of taxation. *See* Sandefur, *supra* at 35-38. But by the time Montanans wrote their constitution in 1889, public opinion had turned decisively against them. "If you have got to coddle and fondle and caress these great capitalists in order to get them to come out here and invest their money," said one delegate at the Montana Constitutional Convention, "then ... we don't want these enterprises, for home capital will produce them." *Proceedings and Debates of the [1889 Montana] Constitutional Convention* 677 (1921). It was not proper for the government "to say that any man, any occupation, any industry shall have one preference over another. There is but one thing to do, and that is to put all classes, all men, all industries, upon the same plane … equal burdens and equal taxation for all." *Id.*

With that principle in mind, the Montana delegates wrote a provision in their Constitution which said: "Neither the State, nor any county, city, town, municipality, nor other subdivision of the State shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation…." Mont. Const. of 1889 art. XIII § 1.[6] The phrase "by subsidy or otherwise," as well as the emphatic phrase "shall ever"[7] were thus

[6] This Clause was superseded when Montana adopted a new constitution in 1972.
[7] This phrase was added so that the Clause would be "comprehensive." *Cook Cnty. v. Chicago Indus. Sch. for Girls*, 18 N.E. 183, 197 (Ill. 1888). On this point, note the distinction between the Gift Clause and Article II Section 12, which says "[n]o public money or property shall be appropriated for or applied to any religious

created to emphasize that under *no circumstances whatever* may the government give aid, whether direct or indirect—including through the elimination of tax liabilities—to private enterprises to encourage their operations.

This fact is reinforced by an incident that occurred at the Arizona Constitutional Convention. As is well known, much of our Constitution was copied from Washington's. *See, e.g.,* Kotterman, 193 Ariz. at 291 ¶ 68. But when it came to the Gift Clause, the authors of our Constitution *rejected* the Washington version, and chose the stronger Montana version, instead, in part to forbid tax-exemption subsidies. Our Gift Clause began as Proposition 106, *see* *The Records of the Arizona Constitutional Convention* 86, 1260-63 (John Goff, ed., 1991), which included a provision copied verbatim from Washington's Constitution—a provision that did *not* prohibit tax-elimination subsidies. *See* id. at 1262; *see also* Sandefur, *supra* at 29-30. It said simply that the state would not give or lend its credit, language which left open the possibility of tax-elimination subsidies. The Arizona Convention, however, chose to *reject* this proposition, and instead adopted Substitute Proposition 106, which replaced the Washington Clause with the

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worship, exercise, or instruction, or to the support of any religious establishment." The latter lacks the emphatic terms "shall ever" or "by subsidy or otherwise." In other words, Arizona's Gift Clause is far more strongly worded even than its prohibition on state funding of churches.

stronger Montana Clause, including its phrase "by subsidy or otherwise." *See* *Records*, *supra* at 405, 485, 1263-66.

The Convention did not *wholly* reject the Washington Constitution's taxpayer protections, however, because it still chose to copy that state's Uniformity Clause, which forbids the state from ever "surrender[ing], suspend[ing], or contract[ing] away" the "power of taxation." *See* Sandefur, *supra* at 52-54. During the subsequent debate, there was a colloquy over how the two clauses related to each other. Delegate Everett Ellinwood—a member of the committee that had drafted Substitute Proposition 106—explained: "I do not approve of exempting or permitting the legislature to exempt railroads from taxation…. If you have this clause in, the railroads cannot claim exemption." *Records*, *supra* at 854.

The bottom line is that while Arizona's framers chose to borrow mostly from Washington's Constitution, they found that Constitution inadequate to prevent the government from subsidizing private enterprise, and chose the more absolute Montana language, instead, which forbids the state from aiding private enterprise by gifts, donations, grants, "subsid[ies] or otherwise," Ariz. Const. art. IX § 7—knowing that this language, combined with other provisions, would forbid the legislature from exempting private, for-profit companies from taxation.

The State essentially ignores, or at least discounts, that key phrase precisely because it is so strong ("absolutist," to use the State's term). State Br. at ep.14. It

claims the Gift Clause, or at least the framers' and Taxpayers' view of it, "defies the precision and detail throughout [the rest of] article 9." *Id.* But the Clause's history proves the opposite: the drafters specifically and intentionally selected the broad terms used in the Gift Clause. And its language is every bit as precise as the rest of Article 9. It simply sweeps wider than the State cares to admit. By contrast, the State's argument would render some of its phrases ineffectual. But because "our constitution's framers chose to [forbid subsidies] with language different and more protective than the [Washington Constitution]," courts must "invest those words with their fully intended meaning." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 306 ¶ 170 (2019) (Bolick, J., concurring).

Worse, the State faults the Gift Clause and Article 9 because the word "subsidy" only appears once. State Br. at ep.13. Of course, duplicative, repetitive, or superfluous language is not required. The word "subsidy" carries as much constitutional weight as the other terms in Article 9—including the words "or otherwise," which the State omits from some of its summations of the Clause. *See id.* at ep.14-15 ("donations, grants, and subsidies"). In fact, the words "or otherwise" provide the "textual basis" that refutes the State's assertion that "[i]f the framers understood tax credits to be a prohibited subsidy, they would have used language in the Gift Clause to reflect that understanding." *Id.* at ep.14. They in fact did use such language, and this Court "must follow the text as written."

Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co., 228 Ariz. 100, 102 ¶ 6 (App. 2011).

B. Tax elimination can be a subsidy.

The elimination of liabilities has *always* been considered the equivalent of a grant of assets. *See* *Maricopa Cnty. v. State*, 187 Ariz. 275, 280 (App. 1996); *Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550, 559-60 (App. 1997); *Rowlands v. State Loan Bd. of Ariz.*, 24 Ariz. 116, 123 (1922); *Puterbaugh v. Gila Cnty.*, 45 Ariz. 557, 564 (1935).[8] *See also* *Golden Gate Bridge & Highway Dist. v. Luehring*, 84 Cal. Rptr. 291, 297 (App. 1970) ("gratuitous assumption of an obligation or reimbursement of an expenditure is not generally permissible [under the Gift Clause].").

Indeed, *Pimalco* and *Maricopa Cnty.* made quite clear that the state may not eliminate a tax liability without proving that doing so satisfies the Gift Clause test.

Yet the State argues that the Gift Clause doesn't apply *at all* to tax credits.[9] State's Br. at ep.8. Not only is this foreclosed by precedent, but it cannot be true. If

[8] It is truly extraordinary that the State cites none of these cases in its brief, relying instead on non-binding, distinguishable cases from other jurisdictions. *See* State Br. at ep.10-11.

[9] Or, at least, to "bona fide" ones. State Br. at ep.8. But that begs the question: what is a "bona fide" tax credit? One that merely reduces a tax liability, as opposed to one that actually pays cash out of the treasury to the recipient? If so, then the State implicitly concedes that the *refundable* tax credits at issue here are not "bona fide," and thus—at a minimum—the Gift Clause applies to so-called "refund"

it were, the State could eliminate any particular individual's or corporation's tax burden by simply "crediting" her or it for the equivalent amount. It could gratuitously provide that Jane Doe or the Compu-Global-Hyper-Mega-Net Corporation would be "credited" for "good citizenship" in the full amount of whatever taxes she or it owes, and this would somehow not qualify as a Gift. That is absurd. *Cf.* *Puterbaugh*, 45 Ariz. at 564 (law barring recovery of debt due to state was unconstitutional gift); *Terrell v. Middleton*, 187 S.W. 367, 368 (Tex. Civ. App. 1916) (reimbursing Governor for his chicken salad was an unconstitutional gift).

Yet the State claims that "tax credits do not implicate anything the state owns," and therefore that it "'cannot make a gift of something that [it] does not own.'" State's Br. at ep.9 (quoting *Kotterman*, 193 Ariz. 288 ¶ 52). That is both untrue and a misrepresentation of *Kotterman*.

First, recall that the tax credits in this case are "refundable" tax credits—which are not true (or "bona fide") tax credits at all. Unlike a true tax credit, if a participant in this Program incurs less tax liability than the "credit" is worth, the state will *send that participant a check* for the difference—i.e., a direct expenditure of public funds. Participants can receive payments from the state even if they have

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payments. That qualification alone obliterates the State's and Appellees' reading of *Kotterman*.

never paid a dime in state income taxes. *See* A.R.S. §§ 43-1082(F), 43-1165(F) ("…or if there are no state income taxes due …"). That's not true of tax credits as normally understood, so that even the name "refundable tax credit" is rather misleading. *See* Reply Br. at 19–20; Resp. to Chamber Br. at 5.[10]

Second, the credits under this Program are calculated based on the amount of tax liability the participant incurs. It is not simply a sort of coupon—and it is certainly not the equivalent of an across-the-board tax cut; instead, it's the elimination of a liability that under the tax code would otherwise exist. Participants in the Program must apply, be preapproved, submit information about their production, and then submit final paperwork, whereupon the state reduces the calculated tax liability. *See* Reply Br. at 22-24.

That means that the state *does*, so to speak, "own" the tax credit at issue.[11] After all, if it did not "own" the tax credit, where would the "refund" (i.e., the check participants receive for the difference) come from? The State fails to address this, and indeed ignores entirely the refundable nature of the credits at issue here.

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[10] No link is provided as these two response briefs are being filed simultaneously with the Court.

[11] *Cf. State ex rel. Corbin v. Superior Ct. in & for Cnty. of Maricopa*, 159 Ariz. 307, 310 (App. 1988) (where government gave enabled private parties to borrow money at low rates—a power that "exist only because of the Development Authority's unique ability as a public agency to borrow money at a lower rate of interest than a private party would have to pay," that was an unconstitutional loan of public credit).

That is why the cases the State cites are inapplicable. *Kotterman* involved a program that did not lessen the participant's financial liabilities at all, and thus gave them no benefit. *See* Reply Br. at 13-24. When the court said that the tax credit couldn't be a gift because the State did not "own" it, what it meant was that the money in question went directly from the taxpayer to the scholarship organizations, without ever going through the state's hands. *See id.* at 16. But here, participants' liabilities *are* reduced, and that reduction comes from funds that *are* in the State's hands. *See, e.g.,* Brief of Senate President Peterson at ep.20.

Cain v. Horne, 220 Ariz. 77, 82 ¶¶ 22–23 (2009)[12], *Manzara v. State*, 343 S.W.3d 656, 660 (Mo. 2011), *Magee v. Boyd*, 175 So.3d 79, 121-22 (Ala. 2015), *Gilligan v. Att'y Gen.*, 595 N.E.2d 288, 291 (Mass. 1992), and *Toney v. Bower*, 744 N.E.2d 351, 357-58 (Ill. App. 2001), are even more off-point. Those cases never said that tax credits cannot be gifts.[13] They said that (*non*-refundable) tax credits aren't *appropriations.*

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[12] *Cain* specifically made the point that the reason the credits in *Kotterman* did not constitute an "appropriation" is because they were "not withdrawals from the state treasury." 220 Ariz. at 82 ¶ 22. That's clearly not the case with Program funds.

[13] Again, the text and scope of Arizona's Gift Clause is meaningfully broader than analogous provisions from *any* other state, including Missouri and Alabama. *See* Sandefur, *supra* at 58 ("Arizona's constitutional prohibition on subsidies [is] the strongest in the United States."). The other states cited—Illinois, and Massachusetts—don't even have Gift Clauses. *See, e.g.,* Matthew D. Mitchell, et al., *Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State Constitutions* 67-68, Mercatus Center (Mar. 24, 2020).

But the question before this Court isn't about whether the credits here are "appropriations." (They obviously are expenditures, since they're "refundable," and participants get checks from the State.) The question is whether they're *gifts or subsidies*. And something can be a gift or a subsidy without being an appropriation, and indeed, without even being a *direct* expenditure, as the court made clear in *Neptune Swimming Foundation v. City of Scottsdale*, 256 Ariz. 551, 560 ¶ 28 (2024) ("An expenditure governed by the Gift Clause … is not limited to monetary expenditures or debt forgiveness.")[14]; *accord, Arizona Ctr. for L. in Pub. Int. v. Hassell*, 172 Ariz. 356, 367-71 (App. 1991) (Clause applied to sale of land); *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356, 363 (1974) (lease of public land).[15]

II. Of course the State can "incentivize"—it just can't give gifts or subsidies.

To emphasize, the question here is not whether the state can choose "*not* to tax," State's Br. at ep.12, the question is whether the state can subsidize private enterprise by creating a targeted financial benefit for a class of businesses, which takes the form of eliminating their income tax liability to the state, and even, in

[14] Tellingly, when the State quotes *Neptune*, it inserts in the middle of its quotation something that the Supreme Court did not say: that a tax credit "does not trigger Gift Clause scrutiny." State Br. at ep.9. The *Neptune* case simply did not say that.
[15] Other states have said the same. *See, e.g., Opinion of the Justices*, 514 N.E.2d 353, 355 (Mass. 1987) ("The fact that the expenditure here takes the form of a tax deduction rather than a direct payment out of the Commonwealth's treasury does not alter the result, for it has been recognized that the tax subsidies or tax expenditures of this sort are the practical equivalent of direct government grants.").

some cases, sending them checks from the treasury. Of course, the state can "incentivize certain behavior." *Id.* at ep.15. But the Constitution forbids it from doing so in particular ways: it may not do so through gifts, loans, donations, or grants, *by subsidy or otherwise*.

Certainly, the state can incentivize certain activities in many ways without violating the Gift Clause. It can give awards, as with the annual Governor's Celebration of Innovation Award.[16] It can reduce regulatory red tape[17] or licensing burdens, as with the Universal Licensing Recognition Act.[18] It can grant certain preferences in hiring or contracting to businesses that provide certain types of social benefits. *See, e.g., Schrey v. Allison Steel Mfg. Co.,* 75 Ariz. 282, 287-88 (1953). It can cut taxes across the board.[19] And, perhaps most importantly, it can *contract* with businesses. In *Stuart v. Lane*, No. 1 CA-CV 15-0746, 2017 WL 3765499, at *4 ¶ 24 (Ariz. App. Aug. 31, 2017), for example, the city structured an agreement to incentivize certain construction, without violating the Gift Clause. And in *Kromko v. Arizona Board of Regents*, 149 Ariz. 319 (1986), it contracted with a private entity to operate a hospital. That didn't violate the Gift Clause, because there was sufficient government oversight that "the fear of private gain or

[16] https://www.aztechcouncil.org/event/2025-governors-celebration-of-innovation-awards/.
[17] https://gov.idaho.gov/cutting-red-tape/.
[18] https://azgovernor.gov/sites/default/files/universallicensingrecognition1_0.pdf.
[19] https://taxfoundation.org/research/all/state/2026-state-tax-competitiveness-index/

exploitation of public funds envisioned by the drafters of our constitution [was] absent." *Id.* at 321.

For these reasons, the State's parade of horribles isn't actually so horrible. *See* State's Br. at ep.16-17. For example, the tax credits for employers who hire recipients of temporary assistance for needy families, or for low-income people affected by increased sales taxes, likely satisfy the Gift Clause because they would be for a public purpose, and the state presumably receives benefits in exchange which are of proportionate value—i.e., such programs reduce the burden on state social services programs. *Cf. State ex rel. Cryderman v. Wienrich*, 170 P. 942, 946 (Mont. 1918) (Gift Clause not violated by expenditures to aid the poor during a crisis because "the primary object is to prevent a class of needy citizens from becoming a permanent public charge" instead of "foster[ing] private enterprises.").

More specifically, consider the tax credit for producers of renewable energy, A.R.S. § 43-1164.03. That statute requires participants to actually produce solar electricity for 10 years, in certain specified amounts. This likely satisfies at least the public purpose prong, by addressing environmental concerns. Also, the program includes government oversight requirements that ensure participants actually generate the electricity. *Id.* § 43-1164.03(G).

Contrast that with the Program at issue here, where a movie company *does not even have to release a film* to receive the credit, and even a check from the

state treasury. And assuming a participant *does* release a film, all the state gets is a line in the end credits saying it was produced in Arizona—something that the evidence shows is of zero value. *See* OB at 40.

Still, there are situations in which the kind of tax credits the State refers to would *obviously* qualify as unconstitutional gifts or subsidies.[20] Suppose, for example, that the State were to offer participants a $10 million "credit" in exchange for investing only $100 in research, or for hiring a single employee at minimum wage for six months, or for producing only one kilowatt-hour of electricity per year. The proportionality would be so out of whack that these would obviously amount to gifts. *See Turken*, 223 Ariz. at 347 ¶ 16 ("a city's purchase of a garbage truck would undoubtedly serve a public purpose. Purchasing the truck for twenty times its fair value, however, would constitute a subsidy to the seller."). Or if the State were to design a tax credit scheme that eliminated all taxes for linen manufacturers,[21] in exchange simply for manufacturing linen—thereby "public[ly] funding [a] private venture[]"—that would violate the Gift Clause. *Schires*, 250

[20] Absurdly, the State points to Article IX Section 13 of the Constitution to prove that the State is free to provide tax exemptions to incentivize certain activities. State's Br. at ep.16. That section was added to the Constitution as an amendment in 1950, and did not change the Gift Clause. If anything it shows that *absent* such an amendment, the Gift Clause would prohibit such tax-elimination incentives—and of course no such amendment exists here.

[21] *City of Tombstone v. Macia*, 30 Ariz. 218, 223 (1926) ("a donation in assisting a company to embark in the manufacture of linen fabrics" would violate the Gift Clause).

Ariz. at 377 ¶ 16. Or if the state were to provide a tax credit for research and development, but never exercise any oversight to ensure that recipients actually engaged in any research and development, that would fail the public purpose prong of the Gift Clause test. *Cf.* *Kromko*, 149 Ariz. at 321.

Even the State concedes[22] that if it created a "credit" that "[gave] away public property in an amount supposedly equal to the tax credit," that would be an unconstitutional gift. State's Br. at ep.20. But why? Because such an arrangement—even if "the legislature could slap a rubber-stamp label of 'tax credit'" on it, *id.* at ep.19—would not be for a public purpose and would not acquire any proportionate value for the State.

This Court need not get bogged down in "[m]yriad … hypotheticals," however. *id.* at ep.17. This case isn't even about *actual* (or "*bona fide*") tax *credits*; it's about a "*refundable*" credit, which means participants get actual checks drawn on the state treasury—i.e., public money collected from other taxpayers. This case is not about social-welfare programs, such as encouraging the hiring of people on state assistance programs. It's about "foster[ing] private enterprises [where] the only benefit to be derived by the public is incidental and secondary." *Wienrich*, 170 P. at 946. This case is not about "social, economic, and environmental policy

[22] This concession cannot be reconciled with the State's assertion that tax credits are categorically outside of Gift Clause scrutiny. *See supra* n.7.

choices." State's Br. at ep.17. It's about a Program that subsidizes a particular private industry by paying it to do business in Arizona, but which acquires no measurable benefit in exchange for the $125 million in valuable benefits that the state is giving "in aid of the promoters of [an] enterprise, work, or improvement … which is considered a proper subject for state aid," which is the dictionary definition of a subsidy. *Black's Law Dictionary, supra* at 1117. And this case is not about cutting taxes prospectively for the state in general—it's about targeting a narrow group of beneficiaries for valuable benefits out of the State's pocket in order to foster their private, for-profit business.

III. Applying the Gift Clause to tax laws makes perfect sense.

The State claims that the application of the Gift Clause to tax-elimination subsidies "makes no sense." State's Br. at ep.15. Of course, this Court has already applied the Gift Clause to tax-elimination subsidies, in *Pimalco* and *Maricopa County*. But the State ignores those cases and relies on a misquotation of *Schires*, *supra*, to claim that "a foregone increase in future revenue" cannot "trigger constitutional scrutiny." State's Br. at ep.15.

In *Schires*, the city paid a private firm to operate in the city. It claimed this was not an unconstitutional subsidy because the firm's operations would generate tax revenue. But the court said this could not qualify as "consideration"—and thus counted as zero in the comparison of "give" and "get" that courts must apply in

Gift Clause cases. 250 Ariz. at 376 ¶ 14, 377 ¶ 18. There were two reasons. First, the obligation to pay taxes is a pre-existing duty, and therefore is not consideration for purposes of contract law, and, second, the firm had never made "an enforceable promise" to pay the city any particular amount. *Id.* at 377 ¶¶ 16, 18.

But here, the state twists this holding to say that if an "expectation of an *increase* in revenue is constitutionally irrelevant," then it "makes no sense for a foregone increase in future revenue" to be weighed in the give/get analysis. State's Br. at ep.15. That is a *non sequitur*. This case does not involve a mere "foregone increase in future revenue." It involves the erasure of a legal tax liability on the part of a narrow class of businesses who are being given this financial benefit—one that can result in them receiving actual checks from the state—in order to encourage their operations. Those are apples and oranges.

The State could characterize *any* elimination of a private entity's liability to the state as "foregoing increased revenue." When it sought to eliminate the individual's liability to the state in *Puterbaugh*, 45 Ariz. at 564, for example, that was "foregoing revenue"—but it was still a gift. When it eliminated a person's obligation to pay back certain state loans in *Rowlands*, 24 Ariz. at 122-23, that could have been called "foregoing revenue," but that was an unconstitutional gift. And when it eliminated individuals' tax liabilities in *Maricopa County*, 187 Ariz. at

280, and *Pimalco*, 188 Ariz. at 559-60, it could have called those "foregoing revenue"—but they, too, were subject to Gift Clause scrutiny.

IV. Gifts granted by statute can facially violate the Gift Clause.

Finally, the State suggests there can be no such thing as a facial constitutional violation under the Gift Clause. Its theory is Gift Clause cases are all "transaction-specific," so that a statute cannot violate the Clause absent the specific details of a particular transaction. State's Br. at ep.21. This is incorrect. The Gift Clause requires two things: it says the state cannot give, lend, donate, etc., any "money, credit or other valuable advantages" to private entities unless (a) it's for a public purpose, and (b) the public receives something in return that is of proportionate market value. *Indus. Dev. Auth. v. Nelson*, 109 Ariz. 368, 372 (1973); *Schires*, 250 Ariz. at 374-75 ¶ 7. It therefore logically follows that in a case like this, where the challenged government program "lacks either of these features in every application," it will be facially unconstitutional. *State v. Wein*, 244 Ariz. 22, 31 ¶ 35 (2018).

The statute in *Rowlands*, *supra,* was declared facially unconstitutional. There, the state first lent money to various individuals, and then later adopted a statute that paid off those loans from the state treasury, thereby eliminating the liabilities of the debtors. 24 Ariz. at 117-19. The court found this unconstitutional

on its face. *See id.* at 122-23. Nothing about the decision turned on any specific facts of the case, or the particular amounts owed by any particular debtors.

It's easy to imagine hypothetical situations, too. If, for example, the Legislature were to adopt a statute that gratuitously handed $1,000 to every person wearing a green shirt, that would be *facially* unconstitutional, because there are no circumstances in which such a program would either serve a public purpose or satisfy the give/get proportionality test. Indeed, as the North Dakota Supreme Court has observed, "the State may not legitimate an unconstitutional gift by pairing it with transfers that do not violate the gift clause." *Sorum v. State*, 947 N.W.2d 382, 391 ¶ 23 (N.D. 2020). A plaintiff, said that court, can prove up "a facial challenge under the gift clause" by showing that "the statute requires some transfers that would be unconstitutional donations regardless of whether other transfers under the statute would not constitute unconstitutional donations." *Id.*

Here, the statutes set forth all the conditions for transactions that will take place under the Program. Section 43-1082(D) sets out the conditions a participant must satisfy to obtain the benefit. Section 43-1082(A) says how much of a benefit participants receive. Of course, neither the Arizona Commerce Authority or the Department of Revenue nor any other agency can expand or contract these statutory criteria. *Pima Cnty. v. Pima Cnty. L. Enf't Merit Sys. Council*, 211 Ariz. 224, 227 ¶ 13 (2005) (agency has no power not granted by statute). And, in fact,

the agencies have not done so. *See* Arizona Commerce Authority, Rule 23-01. Those criteria do not satisfy the public purpose or consideration requirements of the Gift Clause. All the state gets in return for the benefits it gives out is—at best—a credit at the end of the film saying "Made in Arizona" (or something similar), which is worth nothing. And it need not even get that, since the filming does not have to occur in Arizona, and *the film need not even be released* for the recipient to enjoy the benefit. *Id.* § 7(A). Given those rules, there is simply no situation in which the Program can operate *without* "giv[ing] or loan[ing] [the state's] credit in the aid of, or mak[ing] [a] donation or grant, by subsidy or otherwise," to the participants. Ariz. Const. art. IX § 7.

CONCLUSION

The Court should *reverse*.

Respectfully submitted this 8th day of September 2026 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Plaintiffs-Appellants' Response to State of Arizona's Amicus Brief appears in proportionally spaced type of 14 points, is double spaced using a Roman Font, and contains 5,793 words, excluding the table of contents and table of authorities.

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